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No. 78-986

In the Supreme Court of the United States

OCTOBER TERM, 1978

ARKANSAS LOUISIANA GAS CO., PETITIONER

v.

FRANK J. HALL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

This brief is filed in response to the Court's invitation of February 21, 1979, on behalf of the United States and the Federal Energy Regulatory Commission.[1]

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[1] Under Section 402(a)(1)(C),(D),(E), and (F) of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 583, to be codified at 42 U.S.C. 7172(a)(1)(C),(D),(E), and (F), this agency has succeeded to the relevant func-

QUESTION PRESENTED

Whether, in an action for breach of a gas purchase contract subject to the Natural Gas Act, the state courts should have referred the interpretation of the disputed contract provision to the Federal Energy Regulatory Commission under the primary jurisdiction doctrine.

STATUTE AND REGULATIONS INVOLVED

Section 4 of the Natural Gas Act, 15 U.S.C. 717c and regulations thereunder, 18 C.F.R. 154.92-154.95, 157.40 are set forth at Pet. App. 52a-60a.

STATEMENT

Proceedings in the Louisiana Courts

In 1952, petitioner Arkansas Louisiana Gas Company ("Arkla"), an interstate natural gas pipeline company, agreed to purchase natural gas from respondents, a group of producers operating properties in the Sligo Gas Field in Louisiana (Pet. 5; Pet. App. 24a). The 28-year agreement set forth a schedule of prices, including increases in specific amounts to be effective every five years up to an agreed maximum.

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tions and responsibilities of the former Federal Power Commission with respect to the certification and regulation of sales of natural gas in interstate commerce under the Natural Gas Act, 15 U.S.C. 717-717w. The term "Commission" herein refers to the Federal Power Commission or the Federal Energy Regulatory Commission as the context indicates.

(Pet. 5). It also contained a further price escalation provision, described as a "favored nations clause", providing in pertinent part (*id.* at 24a-25a):

> If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract; * * *

After this Court's 1954 decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 ~~(1954)~~, holding that producer sales of natural gas in interstate commerce are subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act, 15 U.S.C. 717, respondents obtained a certificate of public convenience and necessity permitting the sales under Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c) (Pet. 5). They also filed their contract with the Commission as their FPC Gas Rate Schedule No. 4 under Section 4(c) of the Act, 15 U.S.C. 717c(c) (*ibid.*).

In 1961 Arkla acquired an oil and gas lease from the United States covering certain federal lands in the Sligo Field and agreed in the lease to pay specified royalties to the United States on gas produced from the leasehold (Pet. App. 4a). In 1974, respondents

sued Arkla for breach of contract in a Louisiana state court,[2] alleging that the lease payments that Arkla had made to the United States constituted "purchase[s] [of gas] from another party seller" and thus had triggered increases under the favored nations clause (Pet. App. 5a, 28a). They sought damages measured by the difference between the payments they had received from Arkla under the contract price schedule, and the prices allegedly paid to the United States. (*ibid.*).

Arkla contended that its payments to the United States were royalties under a lease, not consideration for the purchase of gas, and did not trigger the favored nations clause (Pet. App. 9a, 33a).

Arkla unsuccessfully moved the Louisiana district court to dismiss the action on the ground that exclusive or primary jurisdiction over the issues was vested in the Commission under the Natural Gas Act (Pet. App. 46a).[3] Following a lengthy trial, the Louisiana district court held, in light of the intentions of the parties at the time when the contract was made, that the favored nations clause had been triggered by the lease payments to the United States, whether characterized as royalties or payments for purchased gas (Pet. App. 24a-38a, 39a-43a).

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[2] *Frank J. Hall, et al.* v. *Arkansas Louisiana Gas Company*, First Judicial District Court, Caddo Parish, Louisiana, No. 225,699 (July 30, 1975). (Pet. App. 46a).

[3] Arkla also sought to remove the case to a federal district court, but the federal court denied its motion.

With respect to damages, however, the court held that under the Natural Gas Act and the "filed rate" doctrine, plaintiffs could recover increases under the favored nations clause only to the extent that those increases had been filed with, or otherwise authorized by the Commission (*id.* at 35a-36a, 42a). Because respondents had not filed increased rates implementing the favored nations increases, the court held that they could not recover damages for periods prior to October 1972 (Pet. App. 35a, 42a).

In October 1972, respondents had acquired the status of "small producers" under Commission orders and regulations,[4] which permitted them thereafter to collect increased rates allowed by their contracts up to the ceilings established in applicable Commission area rate orders without making additional filings. Because the prices paid to the United States were below the maximum area rates applicable after the plaintiffs became small producers, the court concluded that they were entitled to damages from October 1972 through December 1975 (Pet. App. 35a-38a).[5]

2. The Louisiana court of appeal affirmed (Pet. App. 2a-20a). It held that the Commission did not have either exclusive or primary jurisdiction over the issues in the case. It reasoned that the Natural Gas Act does not abrogate private rate contracts, that the claims for breach arose under state contract law,

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[4] See 18 C.F.R. 157.40.

[5] One party, W. E. Hall, Jr., was denied any damages because he had by an amendment to his contract in 1969 deleted the most favored nations clause (Pet. App. 35a).

and that the issues presented—the construction of a contract and the intentions of the parties at the time it was made—did not require the specific technical expertise of the Commission (Pet. App. 7a-8a).

The court of appeal agreed with the trial court's conclusion that the favored nations clause had been triggered by the lease payments to the United States (Pet. App. 8a-11a). It also agreed with the trial court that, by reason of the operation of the Natural Gas Act, plaintiffs were entitled to damages only for the period after October 1972, when they obtained small producer status (Pet. App. 13a-14a). The appellate court also rejected plaintiffs' claims that Arkla was guilty of fraudulent concealment of information about its payments to the United States (Pet. App. 15a). It held, however, that the trial judge's calculations of damages between October 1, 1972 and December 31, 1975 erroneously embraced the entire period of the breach (September 1961 through December 31, 1975), and the court therefore remanded the case for trial on the issue of damages only (Pet. App. 18a-20a).

3. The Supreme Court of Louisiana denied Arkla's application for a writ to review the court of appeal's decision (Pet. App. 22a), and this petition seeks review of the court of appeal's decision.

When the Supreme Court of Louisiana denied Arkla's petition for review, it granted respondent's request that it determine whether damages should have been awarded for the period prior to October

1972 (Pet. App. 23a).[6] In a decision entered after the instant petition was filed, the State Supreme Court amended the judgment of the court of appeal to allow plaintiffs damages for the entire period between September 1961 through December 31, 1975 (Supp. Pet. App. 66a-81a). It held that "[a]lthough defendant was only bound to pay plaintiffs a higher price if plaintiffs filed a new rate schedule with the Commission, it is apparent that defendant prevented the fulfillment of that condition (plaintiffs' filing with the Commission) by failing to inform plaintiffs of its contractual arrangements with the United States government" (Supp. Pet. App. 75a). It further concluded that if plaintiffs had been able to file for an increase, the Commission would have allowed it (*id.* at 77a).

Proceedings Before The Commission

While proceedings were under way in the state district court, Arkla filed with the Commission a petition for a declaratory order that the favored nations clause in its contract with respondents was not triggered by its lease payments to the United States. The Commission declined jurisdiction. It held that it had concurrent jurisdiction with the state court over the question, but that it would follow a policy of deferring "action on contract questions presented to it involving jurisdictional sales which are pending in

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[6] W. E. Hall's recovery, however, was cut off as of the date he agreed to deletion of the favored nations clause (Supp. Pet. App. 81a). See note 5, *supra*.

court."[7] The Commission expressed the view that respondents would not be entitled to any rate under the Natural Gas Act exceeding those specified in their rate schdule on file and in effect under the rate schedule—*i.e.*, rates set forth in their original 1952 contract. The Commission also found that respondents had acquired small producer status effective October 19, 1972, and therefore were not required, under the Commission's small producer regulation, 18 C.F.R. 157.40(e), to file increases with the Commission so long as they recovered no more than the applicable ceiling rates established by the Commission.[8]

Arkla petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Commission's orders.[9] On May 25, 1978, the court of appeals granted the Commission's motion for remand of the record to the Commission for reconsideration. Following further proceedings directed to whether the Commission has primary jurisdiction and whether it should be exercised in the circumstances of this case, the Commission entered an order on May 18, 1979, declining jurisdiction (App., *infra*, 1a-15a).

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[7] *Arkansas Louisiana Gas Company* v. *Frank J. Hall*, FPC Docket No. RI76-28, "Order Denying Petition," March 8, 1976. The Commission issued five additional orders in this Docket: "Order Granting Rehearing for Purposes of Further Reconsideration," May 6, 1976; "Order Denying Application for Rehearing," June 4, 1976; "Order Granting Rehearing for Purposes of Further Consideration," July 30, 1976; "Order Denying Application for Rehearing," January 7, 1977.

[8] Order of November 8, 1976.

[9] *Arkansas Louisiana Gas Co.* v. *Federal Power Commission*, D.C. Cir. No. 77-1146. (May 25, 1978).

The Commission rejected the policy of its predecessor, the Federal Power Commission, of automatically deferring contract questions involving jurisdictional sales of natural gas to state courts in which those questions are pending. Instead, it concluded that it should examine the particular question in the light of three factors: "(1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for a Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission" (App., *infra*, 7a).

Applying those factors, the Commission declined to assert primary jurisdiction. It concluded that in the circumstances of this case, interpretation of the favored nations clause presented no issue requiring exercise of the Commission's special expertise. The outcome turns, rather, on interpretation of the parties' intentions (App., *infra*, 8a-9a). The Commission also noted that the contract had been made long before the Commission's 1961 regulations (18 C.F.R. 154.93) addressing (and prospectively prohibiting) favored nations clauses of this kind. Because there had been no Commission policy concerning such clauses before 1961 (their meaning therefore having been left to the intentions of the contracting parties), the Commission concluded that there was no particular need for a uniform ruling as to the kind of "purchase" that may trigger an automatic price increase under a favored nations clause (App., *infra*, 9a-11a).

Finally, the Commission concluded that the issue would not have a significant impact on its regulatory responsibilities, since respondents made no claim to increases in excess of applicable area ceiling rates (App., *infra*, 12a-13a). The Commission also expressed the view, however, that insofar as the Louisiana Supreme Court attempted to award damages for the period prior to the Hall group's acquisition of small producer status in October 1972, the judgment violated the filed rate doctrine as set forth in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251-252 (App., *infra*, 12a-15a, n.18).[10]

DISCUSSION

The petition in this case is addressed only to the decision of the state court of appeal. That judgment has subsequently been amended, with respect to the period for which damages may be awarded, by the Supreme Court of Louisiana. Arkla filed a petition to review that decision on May 29, 1979 (No. 78-1789). As to the instant case, however, the court of appeal correctly declined to refer the interpretation of the favored nations clause to the Commission under the primary jurisdiction doctrine, and there is no reason for further review of the issue by this Court. Insofar as the Supreme Court of Louisiana held that respond-

[10] The Commission's order of May 18, 1979 is subject to rehearing and judicial review under Sections 19(a) and (b) of the Natural Gas Act, 15 U.S.C. 717r(a) and (b).

ents are entitled to damages in excess of rates on file with the Commission prior to the time that the group achieved small producer status, we believe that the decision is inconsistent with supervening federal law —the filed rate doctrine as set forth in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951).

1. The court of appeal correctly held that the contract interpretation question presented was a matter within the concurrent jurisdiction of the state courts and the Commission. The complaints sought recovery under the provisions of private contracts. "The rights as asserted by [respondents] are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas." *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656, 663 (1961). Moreover, unlike regulatory schemes that require uniform rates to all customers, the Natural Gas Act "expressly recognizes that rates to particular customers may be set by individual contracts," *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, 338 (1956). As the Commission observed in its order of May 18, 1979 (App., *infra*, 9a), its "role with respect to such contracts should intrude no further into doctrines of state contract law than necessary to carry out the responsibilities under the Natural Gas Act." See also *United Gas Co.* v. *Memphis Gas Division*, 358 U.S. 103, 109-110, 112-114 (1958).

The Natural Gas Act may reinforce private contractual rights or abrogate them when they contravene relevant public interests. See *e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968). However, absent adverse effects on the interests protected by the regulatory scheme—for example, prices in excess of established ceilings—the parties should be left to the bargain they have made. This is an appropriate rule even though, under Section 4(c) of the Natural Gas Act, 15 U.S.C. 717c(c), every contract for the interstate sale of gas had to be filed with the Commission.[11] Otherwise, the Commission and the federal courts would be inundated by "a vast current of [contract] litigation indubitably arising under State law * * * *." *Skelly Oil Co.* v. *Phillips Co.*, 339 U.S. 667, 673 (1950). In *Skelly Oil*, for example, this Court held, in a federal diversity action involving the meaning of a term—"certificate of public convenience and necessity"—in a natural gas contract, that the intentions of the parties would be controlling even though the identical term appears in the Natural Gas Act. Moreover, the Court has not required automatic resort to the primary jurisdiction of the Commission in the interests of preserving a uniform scheme of regulation. See *Pan American Petroleum Corp.* v. *Superior Court*, *supra*, 366 U.S. at 666: "'[T]he attainment of uniformity does not require

[11] These requirements have been prospectively changed with respect to gas not previously committed or dedicated to interstate commerce by Section 601 of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, 3409.

that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission.'" (quoting from *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 290-291 (1922)).

Thus, whether the Commission's primary jurisdiction should be invoked in any particular contract dispute involving the interstate sale of natural gas depends upon the public interest considerations that inform the primary jurisdiction doctrine, as applied to the particular case. These include the need for exercise by the Commission of its special expertise in the circumstances of the case; the need for uniformity of interpretation; and the impact of the issues on the regulatory responsibilities of the agency. See *e.g.*, *Nader* v. *Allegheny Airlines*, 426 U.S. 290, 303-304 (1976); *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 305-306 (1973); *Southwestern Sugar & Molasses Co.* v. *River Terminal Corp.*, 360 U.S. 411, 417-418 (1959); *United States* v. *Radio Corporation of America*, 358 U.S. 334, 346-348 (1959); *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 66-67 (1956).

In this particular case, as the Commission has held, these concerns are not implicated. The Commission exercises no special expertise in ascertaining the intentions of contracting parties except where technical issues are presented (App., *infra*, 8a-9a). The contract itself was made before the Commission adopted any policies or regulations concerning favored na-

tions clauses, which in fact were prohibited with respect to contracts entered into after April 3, 1961. 18 C.F.R. 154.93. Thus, as the Commission ruled, "* * * the makers had no guidance from the Commission in drafting the clauses. Since at the time no Commission policy existed requiring uniformity, the meaning of the clauses was left to the intention of the parties. Ascertainment of such intentions is a matter of case-by-case adjudication that does not invoke the considerations of uniformity or technical expertise that would, in other circumstances, support assertion of the Commission's primary jurisdiction" (App., *infra*, 11a). Nor does construction of the favored nations clause on the basis of the intentions of the contracting parties affect the Commission's regulatory responsibilities. Resolution of the dispute turns on evidence of dealings between the parties relevant only to this case.

Petitioner errs in contending that federal court decisions holding that the leasing of gas producing properties is not a jurisdictional sale subject to the Natural Gas Act are relevant to the meaning of the favored nations clause. See *Mobil Oil Corp.* v. *FPC*, 463 F.2d 256 (D.C.Civ. 1971), certiorari denied, 406 U.S. 976 (1972). The fact that such lease arrangements are not "sales" of gas within the Commission's jurisdiction under the Natural Gas Act does not preclude the conclusion that the parties intended them to constitute "purchase[s]" within the meaning of their own contract and as a matter of state law. Nor does it create an "imminent possibility of collision" between state court contract judgments and the Commission's authority to regulate the interstate transportation and sale of natural gas. *Northern Natural Gas Co.* v. *Kansas Corporation Commission*, 372 U.S. 84, 92 (1963). The respondents claimed no damages in excess of rate ceilings established by Commission orders. Thus, while the Commission undoubtedly has primary jurisdiction to consider the reasonableness of rates and practices in order to prevent disruption of the regulatory scheme and the unbalancing of existing rate structures (*United States* v. *Radio Corporation of America*, *supra*, 358 U.S. at 348), no such issues were presented.

2. Respondents sought only to recover from petitioner rates to which they were legally entitled under their contracts and the Natural Gas Act. Under the National Gas Act and well established federal law, jurisdictional sellers of gas are entitled only to rates set forth in their filed rate schedules or (to the extent they are excused from filing such schedules) under their contract pricing provisions, but in no event in excess of Commission established ceilings. Under the filed rate doctrine, they "can claim no rate as a legal right other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Utilities Co.* v. *Public Service Co.*, *supra*, 341 U.S. at 251. Because respondents had obtained small producer status in October 1972—which under Commission regulations relieved them of the obligation to file rate increases so long as they did not exceed applicable ceilings set by the Commission—they were not thereafter limited by the filed

rate doctrine. Prior to that time, however, they could claim no rate under the favored nations clause—which is an indefinite pricing provision that specifies no rate—except by filing with the Commission in accordance with Section 4(c) and (d) of the Natural Gas Act their proposed increase under the clause. The Louisiana Court of Appeal correctly recognized this (Pet. App. 13a-15a).[12] Since the measure of damages claimed turned on lease payments to the United States which did not exceed Commission applicable area ceilings (App., *infra*, 15a,), there was no question concerning the reasonableness of the rates for the Commission to consider.

In our view, the Supreme Court of Louisiana erred in holding that respondents must be deemed to have applied for the necessary rate increases between 1961 and 1972, and that the Commission would have allowed the increases. Even assuming, for the sake of argument, that Arkla's conduct prevented respondents from filing for the rate increases because they were not informed of the lease payments to the United States, this does not override the supervening requirements of the Natural Gas Act's rate filing provisions. See *e.g.*, *Northern Natural Gas Co.* v. *Kansas Corporation Commission, supra.* The *Montana-Dakota* case itself rested upon claims that

[12] See *e.g.*, *Interstate Natural Gas Co.* v. *Mississippi River Fuel Corporation*, 220 La. 43, 55 So.2d 775 (1951); *Ashland Oil & Refining Co.* v. *Federal Power Commission*, 421 F.2d 17 (6th Cir. 1970); *Socony Mobile Oil Co.* v. *Brooklyn Union Gas Co.*, 299 F.2d 692 (5th Cir. 1962).

filed rates claimed to be unreasonably low were a product of fraud. But this allegation did not avoid the filed rate doctrine. The Louisiana Supreme Court's erroneous decision, however, is not the subject of the present petition.[13]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari to review the decision of the Court of Appeal, Second Circuit, State of Louisiana, should be denied.

Respectfully submitted,

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JUNE 1979

[13] As we have noted, page 10, *supra*, Arkla has recently filed a petition for a writ of certiorari to review that decision. While we believe that the decision of the court of appeal, of which the instant petition seeks review, is correct with respect to the issues of the Commission's primary jurisdiction and the filed rate doctrine—and therefore does not warrant this Court's review—the Court may consider it appropriate to defer consideration of the instant petition until it considers the most recently filed petition and the responses thereto. Moreover, while our position here is based on the Commission's decision of May 18, 1979, it should be noted that that decision is, under the Natural Gas Act, subject to reconsideration by the Commission, and to judicial review in the federal courts of appeals. See note 10, page 10, *supra*.

APPENDIX

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY
COMMISSION

Primary Jurisdiction

Before Commissioners: Charles B. Curtis, Chairman; Don S. Smith, Matthew Holden, Jr., and George R. Hall.

Docket No. RI76-28

ARKANSAS LOUISANA GAS COMPANY

v.

FRANK F. HALL, ET AL.

ORDER DECLINING JURISDICTION AFTER RECONSIDERATION OF THE ISSUE ON REMAND

(Issued May 18, 1979)

I

A QUESTION OF JURISDICTION

In this case this Commission [1] is faced with a question of jurisdiction. Should this Commission exercise jurisdiction to the exclusion of state courts to de-

[1] These proceedings were commenced before the FPC. By joint regulation of October 1, 1977 (10 CFR 1000.1), they were transferred to the FERC. The term "Commission," when used in the cotnext of action taken prior to October 1, 1977, refers to the FPC; when used otherwise, to the FERC.

termine whether a royalty agreement between a gas utility and the United States is a "purchase [of gas] from another party-seller" that triggers an automatic price increase under the "most favored nation clause" in a gas supply contract between the utility and certain independent producers of gas? [2]

II

HISTORY OF PROCEEDINGS

A. *The Parties*

Frank J. Hall *et al.* are a group of independent producers of natural gas. Under a 1952 contract with the Arkansas-Louisiana Gas Company ("Arkla"), if Arkla purchases gas from any other producer in the same gas field at a higher price for gas than it pays the Hall group under the contract, Arkla must pay the Hall group that higher price. This contractual provision, known as a most favored nation clause, provides:

> If at any time during the term of this agreement buyer should purchase from another party-seller gas produced from the subject wells or any other well or wells located in the Sligo gas field at a higher price than is provided to be paid for

[2] *Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Setting Matter for Determination on Brief, August 9, 1978. This is not the first time we are facing this case. The FPC first addressed the jurisdiction question in an order dated March 8, 1976. The FPC's previous actions in this case are discussed more fully in Section II, *infra*, pp. 4-5.

> gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the differences between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract.

B. *The State Court Proceedings*

In 1974, the Hall group sued Arkla for breach of contract in a Louisiana State court [3] claiming that royalty payments made to the United States by Arkla since 1961 under a gas supply arrangement with the government had triggered the most favored nation clause. The Hall group claimed that they were entitled to damages retroactive to 1961.

In October 1977, the state court found for the Hall group and awarded substantial damages.

On appeal, the Court of Appeals of Louisiana, Second Circuit,[4] held that: (1) The trial court had proper subject matter jurisdiction. Jurisdiction was not exclusive in the FERC under the Natural Gas Act. And the FERC does not have primary jurisdiction to determine whether the favored nation clause was activated by the royalty payment to the Untied States. (2) The favored nation clause was activated by the royalty payment because the royalty payment was tantamount to a "purchase from another party

[3] *Hall* v. *Arkansas-Louisiana Gas Company*, 1st Judicial District Court, Caddo County, Louisiana, No. 225,699.

[4] *Hall* v. *Arkansas-Louisiana Gas Company*, 359 So.2d 255 (May 1, 1978).

seller." [5] The court remanded the case to the trial court for recalculation of damages. Arkla petitioned the Supreme Court of Louisiana for certiorari. The Supreme Court of Louisiana denied the petition.[6] Arkla has petitioned the Supreme Court of the United States for certiorari.

C. *Action Before the FPC*

After the Hall group first filed suit in state court, Arkla applied to the FPC for a declaratory order

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[5] The Court so found despite its recognition that the theory of ownership advanced by Arkla was:

> . . . in accord with the prevailing state law and federal decisions on this issue. See *Shell Petroleum Corp.* v. *Calcasieu Real Estate & O. Co.*, 185 La. 751, 170 So. 785 (1936); *Logan* v. *State Gravel Co.*, 158 La. 105, 103 So. 526 (1925); *Board of Com'rs. of Caddo Levee Dist.* v. *Pure Oil Co.*, 167 La. 801, 120 So. 373 (1929); *Melancon* v. *Texas Company*, 230 La. 593, 89 So.2d 135 (1956). *Mobil Oil Corporation* v. *Federal Power Commission*, 149 U.S.App.D.C. 310, 463 F.2d 256 (1971), *cert. den.* 406 U.S. 976, 92 S.Ct. 2413, 32 L.Ed.2d 676 (1972).

The Court concluded that the intentions of the parties were not to limit the activiation of the favored nation clause only to situations where there was a technical "purchase," "seller," or "price." The Court decided that royalty payments were within the intentions of the parties when they drafted the favored nation clause.

[6] A related petition for certiorari was also filed by the Hall group. The Hall group petition was granted for the limited purpose of considering the level of damages and whether one member of the group had waived his right to damages. The Louisiana Supreme Court on March 5, 1979, issued its decision on those matters. It has awarded damages for the period 1961 to 1972 which the Court of Appeals had rejected.

construing the favored nation clause contained in its contract with the Hall group.

Before the FPC, Arkla argued that the FPC had exclusive jurisdiction over the dispute. The FPC [7] held:

> There is nc question that sales of natural gas by [the Hall group] to Arkla are subject to the jurisdiction of the Commission.
>
> * * *
>
> However, there is a threshhold question as to the contractual basis of [the] rates. It has been Commission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in court * * *. This case presents a question of concurrent jurisdiction * * * While this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the Court to decide these contract questions.

On Arkla's application for rehearing, the FPC ruled [8] that even if the state court held that the Hall group was entitled to a highe rate under the favored nation clause, they, as jurisdictional sellers, would still be limited to ceiling rates in effect under the

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[7] *ArkansasLouisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Denying Petition (March 8, 1976).

[8] *Arkansas-Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Denying Application for Rehearing (issued June 4, 1976). In these proceedings, the FPC issued other orders which are not relevant at this time.

Commission's regulations. The FPC also noted that since the producers held a small producer certificate effective October 19, 1972, they were not required to make any rate increase filings thereafter.

On February 3, 1977, Arkla petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the FPC's orders.

D. *Actions By The FERC*

On March 21, 1978, the FERC moved in the U.S. Court of Appeals for an order remanding the record in these proceedings to the FERC for further consideration.

On May 25, 1978, the Court of Appeals granted the Commission's motion and remanded the record to the Commission.

On August 9, 1978,[9] the Commission asked for briefs directed towards the question of

> "whether this Commission has primary jurisdiction over these matters, and if so, whether this Commission should exercise such jurisdiction in the circumstances presented here."

The Commission noted that the briefs should not discuss the merits of the case but should limit the discussion to the jurisdictional issues.

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[9] *Arkansas-Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Setting Matter for Determination on Brief.

IV.

DISCUSSION

As noted above, the FPC declined to issue a declaratory order construing the most favored nation clause in the Arkla-Hall contract. It held that there was concurrent jurisdiction with the state court and that it would defer to that court.

The FPC stated that there is a "[c]ommission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in state court." [10]

While we concur in the result reached by the FPC, we do not subscribe to its rationale. Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts, depends, we think, on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission. We believe the FPC's automatic policy of deferral of contract questions pending in state courts to the state courts was erroneous.

In examining whether this Commission has a special expertise which makes it the appropriate forum

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[10] Order Denying Petition (March 8, 1976) p. 3.

to decide whether the Arkla-Hall favored nation clause has been triggered, we note initially that the Commission is, in general, no more expert than a court in deciding non-technical contact questions. However, interpretation of some types of contractual clauses may involve examination of technical issues which are within this Commission's special expertise. Determination of the dispute between Arkla and the Hall group depends upon finding that Arkla has "purchase[d] from another party-seller gas produced from the subject wells or any other wells located in the Silgo gas field at a higher price than is provided to be paid for gas delivered under this agreement." While there are circumstances where the intrepretation of a favored nation clause may involve this Commission's technical expertise,[11] we have been presented with no issue in this case involving our special expertise. Arkla makes no argument in this case that would involve our technical expertise. Arkla's defense to the contract action is that the royalty agreement between itself and the United States is not a "purchase from anothe r party-seller" which triggered the favored nation clause. The outcome of the case appears to turn on interpretation of the intent of the parties to the contract rather than any determination

[11] See *Pure Oil Company* v. *F.P.C.*, 299 F.2d 370 (7th Cir., 1962). In that case the interpretation of a favored nation clause involved the issue of whether certain purchased gas possessed exceptional qualities for peaking purposes which enhanced its value to the extent that a seemingly triggering price was not higher on a comparative basis than the prices paid under the contract.

requiring special technical expertise. We therefore see no reason to exercise our jurisdiction based upon a finding that the case involves a matter within our special expertise.

We next consider whether this case is one in which there is an issue which requires uniform interpretation. We consider the need ofr uniformity in light of the policies Congress has charged this Commission to administer. In this regard we must consider that transactions subject to the Natural Gas Act rest in large part on private contracts and that the Commission's role with respect to such contracts should intrude no further into doctrines of state contract law than necessary to carry out the responsibilities under the Natural Gas Act.[12] While this "Commission has plenary authority to limit or proscribe contractual arrangements that contravene the relevant public interests," [13] and to thi send in appropriate cases, might find that achievement of the purposes of the Natural Gas Act requires that certain terms in contracts should be uniformly interpreted, we do not believe this to be such a case.

In this case this Commission is being asked to interpret a favored nation clause. The dispute is whether under the contract a royalty agreement is a "purchase [of gas] from another party-seller" that

[12] See *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, 343-344 (1956); *United Gas Co.* v. *Memphis Gas Div.*, 358 U.S. 103, 109-110, 112-114 (1958).

[13] *Permian Basis Area Rate Cases*, 390 U.S. 747, 784 (1968).

triggers an automatic pricei ncrease under the favored nation clause. In the circumstances of this case whether a "purchase" occurred within the meaning of the contract depends upon what type of transactions the parties to the contract intended "purchase" to include.[14] What "purchase from another party-seller" means in one gas supply contract does not necessarily mean the same thing in another gas supply contract. The makers of one contract may have intended the favored nation clause to be triggered by events other than those intended to trigger the clause in another contract. Since the meaning of a favored nation clause depends upon the intentions of the parties to the contract, we see no need for uniform interpretation of all faovred nation clauses. Indeed, uniform interpretation would seem to be impossible.

It has been argued that the interpretation of this contract may have involved a state court in determining whether a "sale" had occurred. And the interpretation of the word "sale", it was argued, would involve a state court in the interpretation of an important term defining this Commission's jurisdiction over gas.[15] But this case does not involve determining jurisdiction over gas. We undisputedly have jurisdiction over the gas involved in this case.

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[14] The Louisiana court properly looked to the intentions of the parties to the contract in determining the meaning of the contract. See n. 2, p. 3.

[15] This Commission's jurisdiction extends to "the *sale* of natural gas in interstate commerce fo rresale." Section 1(b) of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717(b).

This case involves contract interpretation. And it is clear that the word "sale" may have a different meaning in a contract than it does under that section of the Natural Gas Act conferring jurisdiction upon this Commission. "The same words, in different settings, may not mean the same thing." [16]

Finally, in considering the need for uniformity, we look at the fact that the contracts between Arkla and the Hall group were entered into long before this Commission became actively concerned with the indefinite price escalator clauses and more particularly with favored nation clauses. The contract in question was entered into in 1952. Not until 1961 did the FPC issue regulations concerning most favored nation clauses.[17] Indeed, in contracts executed after April 3, 1961, most favored nation clauses are prohibited. Since these contracts were entered into before the FPC issued regulations concerning favored nation clauses, the makers had no guidance from the Commission in drafting the clauses. Since at the time, no Commission policy existed requiring uniformity, the meaning of the clauses was left to the intentions of the parties. Ascertainment of such intentions is a matter of case-by-case adjudication that does not invoke the considerations of uniformity or technical expertise that would, in other circumstances, support assertion of this Commission's primary jurisdiction.

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[16] *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 678 (1950).

[17] 18 C.F.R. 154.93.

Finally, we must decide now what impact this case has on our regulatory responsibilities. This type of case, involving small producers not required by regulation under the Natural Gas Act to file for rate increases authorized by contract,[18] is not a matter of great import to our regulatory responsibility as we find no need for a uniform interpretation of a contractual provision, and find that the rates requested are within what the Commission has determined to be the zone of reasonableness.

On the facts of this case, the damages do not exceed applicable area ceiling rates.[19] The Louisiana

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[18] The Hall Group holds small producer certificates which exempt it from certain rate filing requirements. See 18 C.F.R. 157.40. But for this status, the group would have been required, under the filed rate doctrine, to apply for and receive approval of any change in its rates on file with this Commission before it could collect any price increase claimed to have been triggered under the favored-nation clause. *Montana Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). Moreover, whether the group held small or large producer status, such increases could have been recovered only prospectively. *Id.* However, because a small producer is exempt from rate filing requirements and could commence collection of contractually authorized rates on demand to the buyer, a court would be capable of finding an award of damages for the difference between a rate permitted by the contract, *up to applicable limits provided by the Commission* for small producers, and amounts actually collected.

Prior to 1972 the Hall group did not hold small producer certificates. In the "Order Denying Application for Rehearing" issued June 4, 1976, the FPC stated on p. 2, n. 1:

> Prior to the filing of thier small producer application, respondents, of course, as ARKLA contends, would be entitled under the Natural Gas Act only to the rate on file with this Commission and in effect. See *Samedan Oil Corp., et al.*, 37 FPC 207, and cases cited therein.

The FPC held that the producers were not entitled to a rate increase for the period prior to when they held small producer certificates since they had not filed for a rate increase as required by Commission regulation. The Louisiana Supreme Court, however, has awarded damages back to 1961. It concluded that it was Arkla's fault that the Hall group has not filed for a rate increase prior to 1972. The Louisiana Court therefore deemed that the Hall group had fulfilled its obligation to file new rate schedules. On this basis the Louisiana Supreme Court awarded damages for the 1961 to 1972 period after the favored nation clause was found to have been triggered and before the Hall group received small producer certificates.

It is our opinion that the Louisiana Supreme Court's award of damages for the 1961-1972 period violates the filed rate doctrine. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). This Commission, however, does not have the power to review what the state court has done. We note, however, that a petition for a writ of *certiorari* has been filed in the Supreme Court of the United States seeking review of the Louisiana Supreme Court's decision. *Arkla* v. *Hall*, Sup. Ct. No. 78-986, filed December 18, 1978.

[19] On April 25, 1979, we issued an "Order Requesting Additional Information to Supplement Record." Information received pursuant to that request confirms that damages do not exceed applicable area ceiling rates. Arkla contends that damages do exceed the applicable area ceiling rates. Arkla claims that the Louisiana courts erroneously awarded damages for liquefiable hydrocarbons. In this Commission's November 8, 1976, "Order Clarifying and Amplifying Commission Order Denying Rehearing" we stated:

> While the Commission has jurisdiction over natural gas containing liquefiable hydrocarbons, it has no jurisdiction over liquids after thier removal from the gas stream. Consequently, if a contract provides for severable pay-

Supreme Court concluded that the Hall group was entitled to damages measured by the difference between the price Arkla paid the United States under the royalty agreement and the price it paid the Hall group.[20] In so doing, it noted that it considered the fact that the Commission, in previous orders in this case, had stated the maximum rates to which the Hall group would have been entitled if contractually authorized and if proper filing procedures had been followed.[21] The Supreme court of Louisiana further stated:

> ments for the natural gas, including the liquefiable hydrocarbons contained therein, and the subsequently removed liquids, we would have jurisdiction over the sale of the natural gas containing the liquefiable hydrocarbons, but no jurisdiction over the sale of the liquids. But, there is a basic contract question presented with respect to the subject sale as to whether respondents are entitled under the sales contract to a price for the products removed by ARKLA from the natural gas purchased from respondents which is severable from the price for natural gas sold under such contract.

The Louisiana courts found that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate.

[20] As we stated above, the Louisiana Supreme Court, in effect, waived one of this Commission's filing requirements when it determined that the Hall group was entitled to damages back to 1961. This holding of the Louisiana Supreme Court conflicts with the filed rate doctrine.

[21] *Frank J. Hall* v. *Arkansas Louisiana Gas Company*, Supreme Court of Louisiana (March 5, 1979), slip op. p. 11. The Commission's previous orders were its *Order Denying Application For Rehearing*, (June 4, 1976); and *Order Clarifying And Amplifying Commission Order Denying Application For Rehearing* (November 8, 1976).

> We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.[22]

In light of the fact that the Hall group makes no claim for damages higher than the applicable area ceiling rates, that the Louisiana Supreme Court did not authorize rates higher than the applicable area ceiling rates, and that the state district court on remand from the Louisiana Supreme Court will presumably not award damages higher than the area ceiling rates, we do not feel that our regulatory responsibilities are so affected that we must exercise our jurisdiction in this case.

Since we find that we need not exercise jurisdiction under any of the three applicable factors, we decline jurisdiction.

The Commission orders:

Upon review on remand, we decline to exercise jurisdiction on this matter for the reasons stated above.

By the Commission.

[SEAL]

Kenneth F. Plumb,
Secretary.

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[22] Supreme Court of Louisiana, slip op. p. 12, n. 7.

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